

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Ms Food Mart,

Appellant,

v.

Case Number: C0211452

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the United States Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that the Retailer Operations Division (Retailer Operations) properly imposed the withdrawal of the authorization of Ms Food Mart (Appellant) to participate as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.1(l)(1)(iii), in its administration of SNAP when it withdrew Appellant's authorization to participate as a SNAP retail food store.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, a food retailer aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 may file a written request for review of the administrative action with FNS.

CASE CHRONOLOGY

FNS regulations require that stores be reauthorized on a set schedule and a FNS-252-R retailer reauthorization application for stores be completed. The administrative record reveals that Appellant applied for reauthorization to participate in SNAP on April 10, 2018.

On July 2, 2018, Retailer Operations sent a letter to Appellant stating its store was due for reauthorization to accept SNAP benefits, or Appellant reported changes in store ownership or operations that require an update to Appellant's file and review of eligibility to accept SNAP

benefits. The letter stated that a FNS contractor visited Appellant on June 12, 2018, to verify store operations and food inventory and it was determined that the store inventory of staple foods did not meet minimum requirements for depth and breadth of stock. Retailer Operations provided Appellant an opportunity to supply purchase invoices/receipts dated within 21 calendar days prior to the store visit as evidence that Appellant normally carries the minimum required number of varieties, stocking units, and perishables in the meat, poultry, or fish staple food category.

Having not received a response from Appellant, by letter dated July 19, 2018, Retailer Operations informed Appellant that its authorization to participate as a retailer in SNAP would be withdrawn due to the firm's failure to maintain sufficient stock of staple foods to be eligible to accept SNAP benefits. This withdrawal decision was based on information provided on Appellant's reauthorization application and information obtained from a visit to Appellant's store on June 12, 2018.

Retailer Operations stated it considered store's eligibility under the need for access provision at 7 CFR 278.1(b)(6) and determined that Appellant's firm does not qualify for SNAP authorization under this provision. Appellant was also informed that Federal regulations at 7 CFR 278.1(k)(s) require that firms withdrawn from participation shall not be eligible to re-apply for SNAP participation for a minimum period of six months from the effective date of the withdrawal.

On July 26, 2018, Appellant appealed Retailer Operations' determination and requested an administrative review of this action. The appeal request was granted by letter dated August 7, 2018, and implementation of the withdrawal has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2018), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.1(l)(1) establishes the authority upon which the authorization of any firm to participate in SNAP may be withdrawn if it fails to meet established eligibility requirements.

7 CFR § 278.1(b)(1)(i) relays specific program requirements for retail food store participation, which reads, in part:

An establishment . . . shall . . . effectuate the purposes of the program if it . . . meets one of the following criteria: Offer for sale, on a continuous basis, a variety of qualifying

foods in each of the four categories of staple foods . . . including perishable foods in at least three of the categories (Criterion A); or have more than 50 percent of the total gross retail sales of the establishment . . . in staple foods (Criterion B).

7 CFR § 271.2 defines staple food, in part, as:

Those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.

7 CFR § 278.1(b)(1)(ii)(A) of SNAP regulations, as currently implemented, define continuous basis as offering for sale no fewer than three different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety on any given day of operation.

7 CFR § 278.1(b)(1)(ii)(C) of SNAP regulations define “variety”, in part, as:

Different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (e.g., low sodium and lite), flavorings (e.g., vanilla and chocolate), packaging types or styles (e.g., canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (e.g., Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.

7 CFR § 278.1(l)(1) reads, in part:

FNS shall withdraw the authorization of any firm authorized to participate in the program for any of the following reasons [t]he firm fails to meet the requirements for eligibility under Criterion A or B, as specified in paragraph (b)(1)(i) of this section . . . for the time period specified in paragraph (k)(2) of this section.

7 CFR § 278.1(k) reads, in part:

FNS shall deny the application of any firm if it determines that [t]he firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- The manager did not take any action in response to the letter because he did not realize what was needed. The manager also failed to bring the letter to the owners' attention.
- Appellant accepts responsibility for missing the deadline to respond and apologizes. Appellant will be very careful in handling any future requests. Appellant requests another chance to continue to do business with USDA. Appellant provided 16 pages of receipts of food purchased.

The preceding may represent only a brief summary of Appellant's contentions presented in this matter. However, in reaching a final decision, full consideration was given to all contentions presented, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

A review of the store visit documentation illustrates that on the day of the visit the store was deficient by two varieties and four stocking units in the meat, poultry, or fish staple food category. Retailer Operations provided Appellant the opportunity to provide proof of inventory - receipts dated within three weeks (21 days) prior to the store visit. Appellant did not respond to Retailer Operations' request within the 10-day time limit.

Appellant contends that it did not respond to Retailer Operation's proof of inventory request, because the store manager did not understand what was needed and did not bring it to the owners' attention. Appellant apologizes for not responding timely, accepts fault, and provided 16 pages of receipts of food purchased.

Upon review of the 16 pages provided, there were 10 receipts of food purchased. Seven of the receipts were for food purchased after the store visit date. One receipt did not have a date and therefore cannot be considered. The other two receipts did not include items for retail sale, and appear to be for the taqueria which is located within the store, but seems to be a separate business. The receipts show the purchase of bulk meat in 30 pounds, eggs in large bulk sizes, french fries in 5 pound bags, etc. The store photos show there are no storage coolers/freezers for bulk items of this size. The receipts from the Restaurant Depot are in the name of **5 U.S.C. § 552 (b)(7)(E) – 5 U.S.C. § 552 (b)(7)(E)**, which supports that these receipts are truly purchases for the taqueria.

Extenuating circumstances certainly may have contributed to the amount and composition of staple food inventory observed at the firm on the day of the store visit. Nevertheless, no provision in SNAP regulations exists that allows these conditions to establish a valid basis for reversing a withdrawal determination. This review is limited to consideration of the circumstances at the time Retailer Operations' determination was made. It is not within this review's scope to consider actions Appellant may have taken subsequent to this determination to comply with requirements for SNAP authorization, including stocking the store sufficiently or increasing staple food sales to meet SNAP-authorization criteria.

The receipts provided are insufficient to demonstrate Appellant offers qualifying staple foods on a continuous basis. In missing two varieties and four stocking units in the meat, poultry, or fish staple food category, the store did not meet the eligibility under Criteria A. Therefore, Retailer Operations correctly concluded Appellant did not meet Criterion A.

Additionally, an evaluation of the percentages of staple food sales reported on Appellant's retailer application, as well as the photographs and store inventory provided from the store visit, indicate that Appellant did not receive more than 50% of its projected annual sales from the sale of staple foods. Appellant reported staple food sales at 3%, accessory food sales at 5%, and cold prepared and hot foods at 1%. Nonfood, gasoline, lottery, tobacco, and alcohol sales were reported at 91%. Accordingly, Retailer Operations correctly determined Appellant was not eligible for authorization under Criterion B.

As Appellant failed to meet Criterion A and B, Retailer Operations did consider whether Appellant is located in an area with significantly limited access to food as required under SNAP regulation 7 CFR § 278.1(b)(6). In determining whether Appellant is located in such an area, Retailer Operations considered factors such as the distance from Applicant to the nearest currently SNAP-authorized firm and the extent of Appellant's stocking deficiencies in meeting Criterion A and Criterion B. Retailer Operations determined Appellant did not qualify for SNAP authorization under 7 CFR § 278.1(b)(6).

The regulations at 7 CFR § 278.1(l)(1)(iii) state, in part:

FNS shall withdraw the authorization of any firm if the firm fails to meet the requirements for eligibility under Criterion A or B . . . for the time period specified in paragraph (k)(2)" and 7 CFR § 278.1(k)(2) states, in part, "FNS shall deny the application of any firm if it determines that the firm has failed to meet the eligibility requirements for authorization under Criterion A or Criterion B, as specified in paragraph (b)(1)(i) of this section . . . for a minimum period of six months from the effective date of the denial.

There is no agency discretion to impose a sanction of less than six months when a firm does not meet the eligibility requirements for authorization.

SNAP authorization is an administrative privilege, granted upon proof of eligibility and continued proof of compliance with the governing laws and regulations. When a firm is at least once granted authorization to participate in SNAP, this not an unencumbered right or entitlement, and it does not extend in perpetuity. The firm is subject to and must meet the eligibility requirements at regular intervals of reauthorization.

CONCLUSION

Based on a preponderance of the evidence in this matter, the determination by Retailer Operations to withdraw the authorization of Ms Food Mart to participate as an authorized SNAP retailer is sustained. According to 7 CFR § 278.1(l)(1)(iii) of SNAP regulations, Appellant is

ineligible to submit a new application for the subject store for a minimum period of six months from the effective date of withdrawal. In accordance with the Food and Nutrition Act of 2008, as amended, and its associated regulations, this withdrawal action shall become effective 30 days after delivery of this letter. The owners may call 877-823-4369 for general SNAP application information.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owners reside, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within 30 days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

Kim Dameron
Administrative Review Officer

December 12, 2018